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IN THE

Supreme Court of the United States

October Term, 1948.
No. 586

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Supporting Brief.

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IN THE

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No. .....

DANIEL G. MARSHALL,

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vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable, the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California, dated September 23, 1948, which denied [Carter, J., and Traynor, J., voting for issuance of a writ] [R. 28, fol. 53] the petition for writ of mandamus [R. 1-18] (filed in that court as an original proceeding), and the order of said Court, dated October 18, 1948, denying petition for rehearing [Carter, J., and Traynor, J., voting for a rehearing] [R. 31, fol. 61].

Statement of the Matter Involved.

The State Bar of California, a statutory public corporation regulating the practice of law in that state, has authorized participation in its operation as an agency of that state's government by an organization of lawyers which, as is known to said agency, excludes Negroes from membership in such organization. Said orders hold, in effect, that such participation is not violative of the United States Constitution.

Statement of Jurisdiction.

Jurisdiction to review said orders is invoked under the provisions of 28 United States Code, Section 1257(3); Act of June 25, 1948, Chap. 646, 62 Stat. 869, effective September 1, 1948.

Said orders are the final judgment of a final state court.

Argument in support of such jurisdiction appears in the annexed supporting brief.

Questions Presented.

Whether such participation violates the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution as being:

(1) Prohibited governmental action discriminating against persons because of race or color;

(2) Operation of a governmental agency, in part, by means of an entity which discriminates against persons because of race or color.

Reasons Relied on for the Allowance of the Writ.

Such participation violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, since it is prohibited governmental action discriminating against persons because of race or color and amounts to the operation of a governmental agency, in part, by means of an entity which discriminates against persons because of race or color.

Wherefore, petitioner prays that a writ of certiorari issue to bring said orders before this Honorable Court for review, that said orders be reversed, that such further proceedings be had as may be just under the circumstances, for such other relief as may be proper and for costs.

DANIEL G. MARSHALL,

Pro Se.

The undersigned hereby certifies that the foregoing petition is, in his opinion, well founded and that it is not interposed for delay.

DANIEL G. MARSHALL,

Pro Se.

IN THE

Supreme Court of the United States

October Term, 1948.

No. .....

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Honorable Court Has Jurisdiction to Review the Orders in Question.

Jurisdiction to review the judgment in question is invoked under the provisions of 28 United States Code, Section 1257(3); Act of June 25, 1948, Chap. 646, 62 Stat. 869, effective September 1, 1948.

The petition for writ of mandate was filed in the Supreme Court of California as an original proceeding [R. 5, Petition, par. 18]. That court is the highest court of the state (California Constitution 1879, Art. VI, Sections 1-4) and has original, concurrent, coequal and coordinate constitutional jurisdiction with the District Courts of Appeal (another reviewing court), and the Su-

perior Court (the court of general jurisdiction) to issue prerogative writs, including mandamus (California Constitution 1879, Art. VI, Sections 4, 4(b) and 5; *In re Davidson,* 167 Cal. 727; *Goything v. McAleer,* 4 Cal. App. 655.)

A rule has been adopted under the authority of *Brougher v. Board of Public Works,* 107 Cal. App. 15, 20, requiring where it is sought to invoke the original jurisdiction of the Supreme Court or the District Court of Appeal that there be a showing in the petition for the prerogative writ of the circumstances which are asserted render it proper that the writ should issue originally from either of those courts and not from a lower court in the first instance. (Rules on Appeal, Rule 56(a); 22 Cal. 2d 35.) The petition contained allegations of the circumstances asserted to make it proper that the writ should issue originally from the Supreme Court and not from a lower court in the first instance [R. 5, 6, Petition, par. 18].

Without affording petitioner an opportunity to be heard, the petition for the writ was denied, without opinion, Mr. Justice Carter and Mr. Justice Traynor voting for the issuance of the writ [R. 28, fol. 53].

Again without affording petitioner an opportunity to be heard, his petition for rehearing was denied, without opinion, Mr. Justice Carter and Mr. Justice Traynor voting for a hearing [R. 31, fol. 61].

There is no appeal or other proceeding which can be had in California state courts to review said orders of the Supreme Court.

The respondent named in the petition did not file demurrer, answer or return. As allowed by rule (Rules

on Appeal, Rule 52(b), 22 Cal. 2d 35), it filed written opposition to the petition [R. 26, fol. 50, *et seq.*]. The Los Angeles Bar Association, as an interested party named in the petition, also filed a written opposition [R. 19, fol. 34]. These oppositions dealt exclusively with the merits of the constitutional issues. These constitutional issues were:

The Conference of State Bar Delegates is a body created by statute and by rules pursuant to statute. It is a part of the machinery of government in California dealing with the practice of law. Being such, each component element must conform to requirements of the United States Constitution, particularly the equal protection and due process clause of its Fourteenth Amendment. Participation in government by a body or entity which excludes persons because of race or color is a violation of that constitutional guaranty. (*Smith v. Allwright*, 321 U. S. 649; *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 273; *Norris v. Alabama*, 294 U. S. 587; *Pierre v. Louisiana*, 306 U. S. 354.) The Los Angeles Bar Association makes such exclusion. So far as such participation is concerned, it is unconstitutionally formed and cannot, by delegates selected by it from within or without its membership, be allowed such participation. Consequently, its delegates must be decertified.

If the Los Angeles Bar Association is a private organization, and hence may practice racial discrimination, it cannot by reason of this same private character exercise governmental functions. (*Washington ex rel. Seattle Title & Trust Company v. RoBerge*, 278 U. S. 116.)

That the Conference may only advise and recommend does not defeat the point since the principle of *Pierre v. Louisiana*, 306 U. S. 354, is to the contrary.

Had not the Supreme Court denied the petition, an alternative writ would have been issued and the case would have been channeled as provided in the Code of Civil Procedure, Sections 1084-1095.

The case at bar is not one in which it can be concluded that such denials amount only to a refusal by the Supreme Court of California to take original jurisdiction. In the first place, the Supreme Court did not say so as it did in *Brougher v. Board of Public Works,* 205 Cal. 426. In the second place, the statutory character of the State Bar and its relationship to the Supreme Court, under its decisions, are such that the Supreme Court is the only state court in which a claim of right under constitutional guaranties asserted against the State Bar, with respect to its internal operation, can be adjudicated. That court is, as noted, the highest state court.

That it is the only state court able to make such adjudication is shown when it is seen that approval of that court is necessary for the validity of the rules of the State Bar (Business and Professions Code, Section 6077); decisions of the State Bar adverse to attorneys must be filed in that court alone (Business and Professions Code, Section 6081); that court alone has the power to review such decisions. (Business and Professions Code, Section 6082.) Moreover, in proceedings original with it, and not taken to it on appeal, it has reviewed the methods of examination of candidates for admission to practice law. (*In re Admission to Practice Law,* 1 Cal. 2d 61; *Salot v. State Bar,* 3 Cal. 2d 615; *Spears v. State Bar,* 211 Cal. 183; *Staley v. State Bar,* 17 Cal. 2d 119; *In re Shattuck,* 208 Cal. 6.) It has reviewed, likewise in an original proceeding, the act of the State Bar in refusing admission to a candidate

without examination. (*Stillwell v. State Bar*, 29 Cal. 2d 119.)

There are two prerogative writ cases from California, filed as original proceedings in the Supreme Court of that state, which lend support to the petitioner here.

One of these, *Hamilton v. Regents of the University of California*, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343, came here on a record like the one in the instant case, with one exception to be noted. In the cited case, as here, the petition for the writ was filed as an original proceeding in the Supreme Court of California, with no answer or other pleading being filed, and the writ being denied without opinion. (*Hamilton v. Regents, etc.*, 219 Cal. 663.) The exception mentioned is that an opinion was written in the cited case on the denial of the petition for rehearing (*Hamilton v. Regents, supra*) deciding a substantial federal question, while no opinion was written in the case at bar on the denial of the petition for rehearing. In the cited case, the petitioner was not obliged to petition for a rehearing. If he had not, the substantial federal question would nevertheless have been the basis of the denial of the writ in the first instances, as shown by the opinion which was later written. The order denying the writ, upon lapse of the time allowed to file a petition for rehearing, would have been the final judgment.

That the Supreme Court of California did not choose to follow in the case at bar the course it followed in the cited case by filing an opinion showing a substantial federal question on the petition for rehearing ought not to defeat resort to this Honorable Court. If that course had been followed, an opportunity would have been present for the Supreme Court of California to declare itself on

the serious federal question present here. Certainly a review of its orders will not be denied on the suspicion or speculation that they were based on a simple refusal to exercise the discretion so as to make the case a matter not reviewable here. If that court wanted to decide the federal question for the petitioner, it had the opportunity to do so. Not having taken the opportunity to do so, it must be regarded as having decided it against the petitioner which places the matter in a condition for review here.

The second of these cases is *In re Connor,* 16 Cal. 2d 701, 703, and the remand is reported in *Connor v. State of California,* 309 U. S. 631, 84 L. Ed. 989, 60 S. Ct. 708. Compare, also, *Gayes v. New York,* 332 U. S. 145.

The orders of the State Bar certificating the Los Angeles Bar Association as a recognized bar association, and certifying its delegates to the Conference of State Bar Delegates, are orders of the same kind and character as the order of the Regents of the University of California in *Hamilton v. Regents, etc., supra,* and reviewable here also since it was there held that such orders of a state agency are the equivalent of statutes, notwithstanding that the *Hamilton* case reached here as an appeal under Section 237(a) and the case here is certiorari. In either case, the power of review exists if a state statute is drawn in question.

Finally, this is a case like *Williams v. Kaiser,* 323 U. S. 471, 89 L. Ed. 398, and here, like there, the state ground of the decision, if there is one, is neither substantial nor sufficient and this Honorable Court must assume that the denial of the writ was based on the federal question which entitles the petitioner here to review.

Statement of Facts.

The facts shown by the transcript of record and applicable state statutes are as follows:

The State Bar of California is a public corporation.[1] The members of the State Bar are all persons admitted and licensed to practice law in California, except the justices and judges of courts of record, and membership in it is necessary to practice law.[2]

This public corporation is governed by a board known as the Board of Governors.[3] Subject to the laws of the State of California, the Board may formulate and declare necessary rules and regulations.[4] To be certified for admission and license to practice law, a person, must, among other requirements, pass a final bar examination by the Examining Committee of the State Bar.[5] Failure to pay dues fixed by statute[6] results in suspension from membership.[7] Fees become part of the funds of the State Bar,[8] which are used to pay the necessary expenses of the State Bar.[9]

With the approval of the Supreme Court of California, the Board of Governors may formulate and enforce rules

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[1]Business and Professions Code of the State of California, Chap. 4, Secs. 6000-6365; Stats. 1939, Chap. 34, paragraph 1, p. 347; Chap. 4 may be cited as the State Bar Act (Business and Professions Code, Sec. 6000).

[2]The State Bar Act, Secs. 6002, 6125.

[3]*Ibid.*, Sec. 6010.

[4]*Ibid.*, Sec. 6025.

[5]*Ibid.*, Secs. 6060, 6046.

[6]*Ibid.*, Sec. 6140.

[7]*Ibid.*, Sec. 6143.

[8]*Ibid.*, Sec. 6144.

[9]*Ibid.*, Sec. 6028.

of professional conduct for all members of the State Bar.[10] These rules are binding upon all members.[11] The Board has the power to recommend to the Supreme Court the disbarment or suspension of members from practice.[12]

Pursuant to Section 6025 of the Business and Professions Code, the Board has formulated and declared rules.[13] These rules establish a Conference of State Bar Delegates which acts upon all matters referred to it at the annual meeting by the Board of Governors, makes recommendations to it and to recognized bar associations, acts upon resolutions suggesting a change of law and makes an annual report in writing to the Board of Governors.[14] Delegates to the conference have the duty of attending meetings of the conference and the annual meeting of the State Bar and reporting to their respective bar associations.[15]

The Secretary of the State Bar, an employee of the Board,[16] is the secretary of the conference.[17]

Each "recognized bar association" is entitled to elect or appoint delegates, who need not be members of any recog-

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[10]*Ibid.*, Sec. 6076.

[11]*Ibid.*, Sec. 6077.

[12]*Ibid.*, Sec. 6078.

[13]R. 1, Petition for Writ of Mandamus, par. 5.

[14]R. 2, said petition, par. 5; R. 8, *et seq.*, Exhibit "A," Art. VI, Secs. 3-12.

[15]R. 13, 14, Exhibit "A," Art. VI, Sec. 13.

[16]State Bar Act, Sec. 6022.

[17]R. 12, Exhibit "A," Art. VI, Sec. 11(c).

nized bar association, to the conference in accordance with the size of its membership and members of the State Bar. who are not members of any recognized bar association, may also name delegates to the conference in the manner provided in the rules.[18]

The Board of Governors is required to recognize and certify bar associations which require, as a condition of membership, membership in the State Bar as "recognized bar associations," there being a limitation respecting the minimum number of members of such "recognized bar associations."[19]

The Los Angeles Bar Association is an unincorporated bar association which has been certified by the Board of Governors as a recognized bar association.[20]

The association has a written constitution which does not expressly prohibit the admission of Negroes, otherwise eligible thereunder, but as a matter of practice they have never been, at any time mentioned herein, and are not now, admitted to membership therein.[21]

The fact of this discrimination against Negroes has been known to the Board of Governors and the Secretary of the State Bar for several years past.[22]

Notwithstanding this knowledge, delegates from the Los Angeles Bar Association have been certified and accredited

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[18]R. 8, Exhibit "A," Art. VI, Secs. 4, 5.
[19]R. 7, Exhibit "A," Art. VI, Sec. 2.
[20]R. 2, said petition, par. 7.
[21]R. 2, said petition, par. 6.
[22]R. 2, said petition, par. 8.

to the Conference of State Bar Delegates at its 1946 and 1947 meetings, and they participated in the performance of the duties of the conference thereat.[23] Such was also the case at the 1948 convention.[24]

Demands that such certifications and accreditations upon the Board of Governors and the Credentials Committee of the conference be cancelled have been fruitless.[25]

Funds from the treasury of the State Bar have been used for the operation of the conference.[26] The treasury includes funds collected as dues from members of the State Bar, of whom petitioner is one, and which includes Negro members.[27]

There is no racial condition to membership in the State Bar.[28] Membership in the Los Angeles Bar Association is not necessary to practice law. Membership in a recognized bar association is not a condition to the status of delegate to the conference.[29] The State Bar Act of California created an integrated bar.[30]

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[23]R. 3, said petition, pars. 10, 11.

[24]Said petition does not allege this fact. It was filed before the 1948 Convention and acted on thereafter.

[25]R. 3, 4, said petition, pars. 13, 14, 15.

[26]R. 4, said petition, par. 16.

[27]R. 4, said petition, par. 16.

[28]State Bar Act, Sec. 6060.

[29]R. 9, said petition, Exhibit "A," Art. VI, Sec. 5.

[30]151 A. L. R. 617.

Specification of Errors and Argument.

The Supreme Court of California erred in making said orders and judgment for the reason that bestowal of the status of a recognized bar association by the State Bar of California, an agency of the government, on the Los Angeles Bar Association, a private association, which, known to that state agency, discriminates against Negroes in its membership policy, certification and accreditation of delegates from that Association by the State Bar to the Conference of State Bar Delegates, an integral phase in the operation of such agency established by the State Bar, and participation in the functioning of said Conference by said delegates violates the due process and equal protection clauses of the United States Constitution.

This substantial federal question was presented to the Supreme Court of the State of California by the petition for writ of mandamus [R. 4, Petition, par 17].

Certification of the Los Angeles Bar Association as a recognized bar association, and accreditation of its delegates by the State Bar of California, knowing of the racial exclusion policy of the Association, and participation of the delegates in the functioning of the Conference of State Bar Delegates, created by the State Bar as an integral part of its operation as an agency of the government, falls within the interdiction of *Smith v. Allwright, supra; Nixon v. Herndon; Norris v. Alabama, supra,* and *Nixon v. Condon, supra.*

It is, moreover, within the realm of unconstitutionality spoken directly of by the Supreme Court of California

itself in *James v. Marinship Corp.*, 25 Cal. 2d 721, since it is a discriminatory practice contrary to the public policy of that state and the United States.

The Fourteenth Amendment protects the citizen against the state and all its creatures (*West Virginia State Board v. Barnette,* 319 U. S. 624) and this protection is needed here.

Justification of the racial exclusion policy of the Los Angeles Bar Association on the ground that it is a private organization, constitutionally entitled to discriminate, leads inevitably to the conclusion that it cannot, by reason of this same private character, exercise governmental functions, on the authority of *Washington ex rel. Seattle Title & Trust Company v. RoBerge,* 278 U. S. 116.

Nor is the fact that the Conference of State Bar Delegates is an advisory body only sufficient to excuse the situation of which complaint is here made, according to *Pierre v. Louisiana,* 306 U. S. 354.

Respectfully submitted,

DANIEL G. MARSHALL,

Pro Se.

[illegible]

[illegible]

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

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THE STATE BAR OF CALIFORNIA, a Public Corporation,

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PETITIONER'S REPLY BRIEF.

Statement.

Respondent does not dispute any facts shown in the petition. The cause is now joined on the merits of the constitutional issues.

I.

That the Petition Does Not Show Petitioner Is a Negro Does Not Defeat His Right to Review Here.

Without any support in the record, respondent asserts that petitioner is not a Negro. The record is silent concerning the racial derivation of petitioner. That derivation is immaterial. It may be that petitioner has no genealogical information sufficient to enable him to state under oath that he is or is not a Negro, racial classification being judicially largely a matter of geography and

the nearly impossible application of an involved arithmetical formula[1]

But if he is not a Negro, the record shows he is and was a member of the State Bar at all times mentioned in his petition for mandamus[2] by admission of respondent. The due he has paid[3] under compulsion of statute[4] have gone into respondent's treasury,[5] which has been drawn upon to pay the expenses of the operation of the Conference of State Bar Delegates,[6] whose secretary is the secretary employed by respondent.[7]

The test here is the color of petitioner's dues-money, not of the hand with which he delivers it to respondent. Be he white, brown, black, red or yellow, or any one of the hues of the rainbow or spectrum, he has a justiciable right, regardless of his melanin content to insist that the key of respondent's cash box be turned in the lock against expenditures for such unlawful purposes as, say, financing an organization acting to overthrow the government by force and violence (the Smith Act, 18 U. S. C. 2385);

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[1]*Who Is Legally a Negro?* Vol. III, No. 2 Intramural Law Review of New York University, School of Law, page 91 (April, 1948).

[2]R. 1, Petition for Writ of Mandamus, paragraph 1.

[3]R. 4, said Petition, paragraph 16.

[4]State Bar Act, Sections 6140, 6143.

[5]State Bar Act, Sections 6028, 6144.

[6]R. 4, said Petition, paragraph 16.

[7]R. 12, said Petition, Exhibit "A," Article VI, Section 11(c): State Bar Act, Section 6022.

to establish a state religion (First Amendment, United States Constitution) or, as here, to aid and abet the operation of a state agency by a discriminatory racial practice contrary to the public policy of the State of California and the United States.[8]

Negro or not, petitioner has the right to insist that not one mill of his dues be used to subvert the constitution in the operation of this state agency, the same constitution he swore to uphold when he was admitted to the bar.[9] This cavil of respondent pollutes the clean stream of constitutional life. Must the Gentile taxpayer stand by on the courthouse steps while the state surgeon, using a tax-bought scalpel, emasculates the Jewish citizen? The Jew may not want to establish his elegibility for that scalpel by making the sortie into the forum where he ought to but might not succeed if he mistakes his remedy or prints his petition in type not authorized by the rule. Is the white taxpayer to be told his petition to enjoin the expenditure of municipal funds to purchase a rope to lynch a Negro is futile since, forsooth, his neck is not intended for the noose?

Is it only the victim of a discriminatory racial practice violative of the public policy of the state and of the United States who can speak in a tone loud enough to catch the judicial ear? Moreover, a discriminatory law is, equally

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[8]*James v. Marinship Corp.*, 25 Cal. 2d 721.

[9]State Bar Act, Section 6067.

with other laws offensive to the constitution, no law at all. To hold fast to the rule urged by respondent in a case like this one where grave questions of constitutionality must necessarily be determined in a real, earnest and vital controversy between litigants is to exceed the limits fixed by the reasons for the rule, which must yield to a policy paramount to the reason itself. Here the need of striking down a discriminatory practice contrary to the public policy of state and nation is paramount to the reason petitioner advances for invocation of the rule.[10] Here, as in certain decisions of this Court, the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.[11]

The injury sustained by the petitioner in this situation is neither indirect nor remote. The right to vote at the Conference of State Bar Delegates is a special form of the voting franchise around which this Court threw the cloak of constitutional protection in *Smith v. Allwright*, 321 U. S. 649. Whatever else the respondent state agency does with it, it cannot limit that franchise by unconstitutional means. To allow delegates of the Los Angeles Bar Association to vote at the conference is to dilute the effect of voter's constitutional presence, such dilution being the effect of the exercise of the voting franchise by an illegally constituted delegation. Such dilution of the constitutional

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[10]5 Cal. Jur. 625, Section 54.

[11]*Truax v. Raich*, 239 U. S. 33, 38, 39; *Buchanan v. Warley*, 245 U. S. 60.

vote in a *pro tanto* denial of the franchise. Consequently, the presence of an illegally constituted delegation is a direct injury to delegates, such as petitioner, who are constitutionally present.

Four decisions of this Court are cited by respondent in support of its claim of lack of capacity of petitioner to raise the constitutional considerations.[12]

Three of them show that no question was raised with respect to the deprivation of property in contravention of the Fourteenth Amendment.[13] That question is raised here and for that reason alone they have no significance in the case at bar. That the property right of petitioner is small is shown by the analogy of another of these four cases to be unimportant.[14] The same case does not deal with the point for which respondent names it but lays down two rules with which, if it is at all applicable, petitioner complies, namely: (1) The judicial power does not extend to the determination of abstract questions; (2) claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention. Here a real and not an abstract right is to be determined and here there is an actual, not an assumed invasion of rights.

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[12]Respondent's Brief, pages 2, 3.

[13]*Tileston v. Ullman*, 318 U. S. 44; *Columbus & G. R. Co. v. Miller*, 283 U. S. 96; *Liberty Warehouse Co. v. Burley, etc. Ass'n* 276 U. S. 71.

[14]*Ashwander v. T.V.A.*, 297 U. S. 288.

II.

There Is No State Ground of the Decision Here Sought to Be Reviewed.

Respondent makes no answer to the argument of petitioner's brief that the statutory relationship of respondent and the Supreme Court of California is such as to make that tribunal the only State court with jurisdiction to curb, by prerogative writ, the unconstitutional discriminatory racial practice shown by this record to be present in the internal operation of respondent, an integrated bar.

The constitutional, traditional and statutory control of the bench over the bar amply supports such legislative distribution of jurisdiction of prerogative writs.

This being so, the California decisions cited by respondent[15] do not show that the action of the Supreme Court of that state, in this case, was upon the non-Federal ground of discretionary refusal of jurisdiction since they deal with prerogative writs upon subjects where the Supreme Court does not have exclusive and final jurisdiction. One of them[16] shows precisely the situation which petitioner claims is here present. In the cited case the court pointed out, citing a decision of this Court,[17] where the litigation originated in the California Supreme Court, that the denial by that court, without written opinion, as was the case here, of an application for writ of review of an order of the Railroad Commission constituted a final adjudication of the correctness and the validity of the decision which

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[15]Respondent's Brief, pages 4-6.

[16]*Funeral Dir. Assn. v. Board of Funeral Dirs.*, 22 Cal. 2d 104, 107.

[17]*Napa Valley Co. v. Railroad Commission*, 251 U. S. 366.

it was attempted to have reviewed. That result was reached because, as in the case at bar, the Supreme Court of California had *exclusive* juridiction.[18]

III.

If There Is a State Ground of the Decision Here Sought to Be Reviewed, It Is so Unsubstantial as to Require the Assumption by This Court That It Is Based on a Federal Question Wrongly Decided.

Under this view this is a case like *Williams v. Kaiser,* 323 U. S. 471, and here, like there, the state ground of the decision, if there is one, is neither substantial nor sufficient and this Honorable Court must assume that the denial of the writ was based on the Federal question which entitles the petitioner here to review.

The importance of the constitutional issues here raised, dealing as they do with the internal professional composition of an arm of the court, must overpower a pretended or purported exercise of discretion under a state court rule. The issue here has gravity like that in *Perez v. Lippold,* 32 A. C. (Advance Sheets, California Supreme Court 757, decided October 1, 1948), where the California Supreme Court took original jurisdiction in another mandamus case. That court has recently indulged its discretion in a very large number of original prerogative writ cases dealing with property rights, such as *City of Whittier v. Dixon,* 24 Cal. 2d 664, 668; *City and County of San Francisco v. Boyd,* 22 Cal. 2d 685, 707; *City and County of San Francisco v. Linares,* 16 Cal. 2d 441, 448. The human rights here involved indubitably were at least as well entitled to the speedy attention of the state court of last resort.

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[18]*Funeral Dir. Assn. v. Board of Funeral Dirs.,* 22 Cal. 2d 104, 107.

Conclusion.

Respondent defends its entire position on the two points already answered and it is safe to say that they are its only points, notwithstanding its claim that because of their strength "respondent will not burden this Court with a consideration of the many other points raised in petitioner's brief herein."

The gravity and urgency of the case at bar, it is respectfully represented, are such that the issues ought to be decided here, a Federal question existing which was presented and fruitlessly urged below. Dealing as it does with a fundamental human right, related to the profession which has a peculiar and tremendous obligation of loyalty to and implementation of the United States Constitution, there can be no legal concept paramount to the relief here sought. But if the obscurantism injected by the failure of the court below to file a written opinion has been effective to conceal for the moment the Federal question here present, then this Court ought nevertheless to grant certiorari and remand the cause to the Supreme Court of the State of California to give that court a final opportunity to pass correctly upon the constitutional issues here involved. Any course less than that will only delay a final disposition of the issues which have the qualities of importance and urgency.

Respectfully submitted,

DANIEL G. MARSHALL,
Pro Se.

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IN THE

Supreme Court of the United States

October Term, 1948

No. 586

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioner, who is not a Negro, applied to the Supreme Court of California, in an original proceeding, for an alternative writ of mandate commanding respondent, The State Bar of California, and its Board of Governors, in effect to sever all connections with The Los Angeles Bar Association on the ground that the bar association denies membership to Negro lawyers as a matter of practice. [R. 1 to 14.] The petition and a subsequent petition for rehearing were denied without opinion. [R. 28 and 31.]

Respondent respectfully submits that Certiorari should not be granted because petitioner has no standing to raise the constitutional issues which he attempts to present, and further because no Federal question was decided by the State Court.

Because these features stand out so sharply, respondent will not burden this Court with a consideration of the many other points raised in petitioner's brief herein.

Questions Presented.

1. Whether a person not a Negro has standing in this Court to claim a denial of constitutional rights to Negroes.

2. Whether this Court will review State Court orders which did not adjudicate a Federal question.

ARGUMENT.

I.

The Petitioner, Not Being a Negro, Has No Standing to Claim That Respondent Has Discriminated Against Negroes in Violation of the Federal Constitution.

The Petition for Writ of Mandamus [R. 4, par. 17], the Petition for Writ of Certiorari herein, as well as the Brief in support thereof, and in particular the Specifications of Errors therein at page 15, all proceed on the basis that respondent had unconstitutionally discriminated against *Negroes*. Petitioner, in his Petition for Writ of Mandamus below, did not allege that he was a Negro and in fact excluded himself from that category [R. 4, Pet., par. 16.] In his Petition for Rehearing below [R. 29] petitioner did not deny that he was not a Negro, though that had been the basis of paragraph 1 of the Points and Authorities of The Los Angeles Bar Association below [R. 19].

Thus the situation that was here in *Tileston v. Ullman*, 318 U. S. 44, is once again presented. There the appeal was dismissed since the appellant asserted that a state

statute deprived his patients, not himself, of rights secured under the Federal Constitution. Applying the rule that has been adhered to from the early days, the Court held at page 46:

> "* * * The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. Cronin v. Adams, 192 U. S. 108, 114, 48 L. ed. 365, 24 S. Ct. 219; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 S. Ct. 784; Bosley v. McLaughlin, 236 U. S. 385, 395, 59 L. ed. 632, 636, 35 S. Ct. 345; Blair v. United States, 250 U. S. 273, 63 L. ed. 979, 39 S. Ct. 468; The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.), 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 S. Ct. 509; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 S. Ct. 498. No question is raised in the record with respect to the deprivation of appellant's liberty or property in contravention of the Fourteenth Amendment, * * *."

See, also:

Columbus & G. R. Co. v. Miller, 283 U. S. 96, 99 100;

Liberty Warehouse Co. v. Burley etc. Assn., 276 U. S. 71;

Ashwander v. T. V. A., 297 U. S. 288, 347, 348.

Petitioner has no standing to claim or set up the constitutional issues which he attempts to bring here.

II.

The State Court Below Did Not Decide Any Federal Questions.

This Court, from its beginning, has consistently applied the rule that it will not review orders of State Courts that rest on adequate and independent state grounds. (*Herb v. Pitcairn*, 324 U. S. 117, 125, 126.) While an attempt was made in the petition below to present Federal questions to the State Court [R. 4, Pet., par. 17], that Court did not in its orders adjudicate any such questions.

The petition below was filed in the Supreme Court of California as an *original* proceeding. That Court exercises concurrent jurisdiction with the District Courts of Appeal (intermediate appellate courts) and the Superior Courts (trial courts of first instance) in the issuance of prerogative writs, including mandamus. (Pet. Br. pp. 5 and 6.)

A petitioner, however, is not entitled to such a writ as a matter of right—its issuance is discretionary with the Court. (*Friedland v. Superior Court*, 67 Cal. App. 2d 619, 628; *Sipper v. Urban*, 22 Cal. 2d 138, 141.) A writ of mandamus will not be granted unless it is necessary "to protect a substantial right" and only when there is a showing that "some substantial damage will be suffered by the *petitioner* if the writ is denied." (Italics supplied.) (*Thomasson v. Jones*, 68 Cal. App. 2d 640, 642; *Friedland v. Superior Court*, 67 Cal. App. 2d 619, 628; *Ault v. Council etc. of San Rafael*, 17 Cal. 2d 415; *Fritts v. Charles*, 145 Cal. 512, 513; *Funeral Directors Assn. v. Board of Funeral Directors*, 67 Cal. App. 2d 311, 313; Calif. Code of Civil Procedure, sec. 1086.) Because the Superior Courts have concurrent jurisdiction with the Supreme Court in the issuance of such writs, because Superior

Courts are in a much better position to determine questions of fact, and because of the undue burden that would otherwise be imposed on the Supreme Court, that Court has adopted "* * * a rule governing the discretionary action of the court in passing upon an application for a prerogative writ, that such applications will not be entertained where there is no sufficient reason shown why the application was not made in the superior court." (*Brougher v. Board of Public Works*, 107 Cal. App. 15, 20; Rules on Appeal, Rule 56(1), 22 Cal. 2d 35; *Roma Macaroni Factory v. Giambastiani*, 219 Cal. 435, 437; *Imperial Land Co. v. Imperial Irrigation District*, 166 Cal. 491; *Brougher v. Board of Public Works*, 205 Cal. 426, 440.)

Without examining the petition below further, we can see that on the above mentioned points alone the Supreme Court of California was justified in the exercise of its discretion, in denying the original application before it. That such petition discloses no necessity to protect a substantial right of *petitioner* therein and does not show that substantial damages will be suffered by *petitioner* if the writ is denied, is at once apparent even if we should assume for sake of argument that it presents a need to protect a substantial right of Negroes and that such persons will sustain substantial damages if the writ is denied. Nor does the petition show a sufficient reason why it was not originally presented to the Superior Court. The "peculiar emergency or exigency" relating to the meetings of the Conference set for September 14 and 15, 1948, which was asserted in the petition below [R. 6, Pet., par. 18]*

*Though the Transcript of Record is silent on the subject, the Petition for Writ of Mandate below was filed September 10, 1948.

as a reason rendering it proper for the California Supreme Court to exercise original jurisdiction, no longer existed when that Court on September 23, 1948, denied the petition [R. 28]. And, of course, as to all the points mentioned in this paragraph, this Court will not review the determination made thereon by the Supreme Court of California. (*Herb v. Pitcairn*, 324 U. S. 117, 125, 126.)

Where, as in the instant case, the Supreme Court of California, in its initial action, declines to issue a prerogative writ on an *ex parte* application by denying the petition before the issuance of an alternative writ, such action "* * * is not an adjudication upon the merits of the facts presented in the application," but constitutes "simply a refusal by this court to exercise its *original* jurisdiction." (Italics supplied.) (*Funeral Directors Assn. v. Board of Funeral Directors*, 22 Cal. 2d 104, 110; *McDonough v. Garrison*, 68 Cal. App. 2d 318.)

Accordingly, the Supreme Court of California did not adjudicate any of the Federal questions which the petitioner attempted to assert in the petition below, thus making applicable the rule that:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." (*Herb v. Pitcairn*, 324 U. S. 117, 125.)

And it is axiomatic that:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that

its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (*Lynch v. New York ex rel Pierson*, 293 U. S. 52, 54.)

Conclusion.

Respondent respectfully submits that certiorari should not be granted because it is apparent that the Supreme Court of California has not decided any Federal question; furthermore, because the petitioner patently has no standing to raise the constitutional issues which he attempts to assert in his various petitions below and here.

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